

# **Prosecution of Public Corruption: An Overview of Amendments Under H.R. 2572 and S. 2038**

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## Summary

The House Judiciary Committee has approved an amended version of the Clean Up Government Act (H.R. 2572). The Senate has passed nearly identical provisions as Title II of the Stop Trading on Congressional Knowledge Act (S. 2038). Title II, however, was dropped from the bill prior to its enactment as P.L. 112-105, 126 Stat. 291 (2012). Among other things, Title II and H.R. 2572 would each:

- Expand the scope of federal mail and wire fraud statutes to reach undisclosed self-dealing by public officials—in response to *Skilling*.
- Amend the definition of official act for bribery purposes—to overcome the *Valdes* decision.
- Adjust the federal gratuities provision to reach “goodwill” gifts—in response to *Sun Diamond*.
- Increase the criminal penalties that attend various bribery, illegal gratuities, embezzlement statutes, and related provisions.
- Extend the statute of limitations from five to six years for several corruption offenses.
- Authorize the trial of perjury and obstruction charges in the district of the adversely effected judicial proceedings.
- Authorize the trial of multi-district cases in any district in which an act in furtherance is committed.
- Increase the number of public corruption offenses considered and wiretap predicate offenses.

H.R. 2572, alone, would:

- Increase the maximum penalties under the federal bribery and illegal gratuities statute.
- Amend the federal law criminalizing the theft or embezzlement of federal property to include property of the District of Columbia.
- Limit the prosecution of bribery and illegal gratuity cases under 18 U.S.C. 201 to cases involving \$1,000 or more.

This report is available in an abridged version, as CRS Report R42015, *Prosecution of Public Corruption: An Abridged Overview of Amendments Under H.R. 2572 and S. 2038*, by Charles Doyle, which lacks the footnotes, attributions, and citations to authority found in this report. Related CRS Reports include CRS Report R40852, *Deprivation of Honest Services as a Basis for Federal Mail and Wire Fraud Convictions*, by Charles Doyle, and CRS Report R41930, *Mail and Wire Fraud: A Brief Overview of Federal Criminal Law*, by Charles Doyle.

## Contents

Introduction .....	1
Mail and Wire Fraud.....	2
Public Officials: Undisclosed Self-Dealing .....	2
Bribery and Gratuity Changes .....	7
Section 201.....	7
Section 666.....	10
Embezzlement and Other Theft of Federal and District of Columbia Property .....	11
Penalty Increases .....	12
Sentencing Guidelines.....	14
Related Provisions .....	15
Statute of Limitations .....	15
Venue.....	16
Place of Acts in Furtherance .....	16
Place of Obstructed Activities.....	18
Wiretap Authority.....	19
Judicial Disciplinary Investigations .....	19
Appeals.....	20
Where They Differ .....	20
What Has Changed.....	21

## Contacts

Author Information.....	22
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## Introduction

On February 2, 2012, the Senate passed S. 2038, the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act). Title II of the STOCK Act, added as the Leahy-Cornyn amendment on the Senate floor, carries forward much of what had appeared in S. 401, when it emerged from the Senate Judiciary Committee. Title II, styled the Public Corruption Prosecution Improvements Act, closely tracks the amended language of H.R. 2572, which the House Judiciary Committee unanimously approved on December 1 of last year.<sup>1</sup> The House, however, stripped Title II from S. 2038,<sup>2</sup> and the bill was enacted into public law without it.<sup>3</sup> In the discussion that follows, Title II refers to Title II of the STOCK Act as initially passed by the Senate.<sup>4</sup> H.R. 2572 refers to the bill ordered to be reported as reflected in the Manager's Amendment in the Nature of a Substitute, as amended in Judiciary Committee markup.<sup>5</sup>

Federal officials prosecute corruption—public and private; federal, state, local, territorial, and tribal—under a number of statutes including those that outlaw bribery, bribery involving federal programs, mail fraud, and/or wire fraud. The bills would expand the scope of these and related federal statutes, increase the penalties for those convicted, and amend related procedures to facilitate prosecution. The bills represent a merger of two prior efforts. One involved reactions to the Supreme Court's *Skilling* decision, which limited honest services mail and wire fraud prosecutions to cases of bribery and kickbacks. The other involved a more general concern over the state of law in the area of public corruption. The Senate Judiciary Committee addressed this second concern when it reported S. 1946 to the floor during the 110<sup>th</sup> Congress.<sup>6</sup> The bills are reminiscent of many of the provisions in that earlier proposal. Several would extend the reach of federal anti-corruption statutes read more narrowly in *Skilling*, *Sun Diamond*, and *Valdes*.<sup>7</sup>

<sup>1</sup> Available on the House Judiciary Committee's website at <http://judiciary.house.gov/hearings/pdf/12012011%20RC%201%20-%20Final%20Passage.pdf>.

<sup>2</sup> 158 Cong. Rec. H645 (daily ed. February 9, 2012).

<sup>3</sup> P.L. 112-105, 126 Stat. 291 (2012).

<sup>4</sup> 158 Cong. Rec. S310 (daily ed. February 2, 2012).

<sup>5</sup> Available on the House Judiciary Committee's website at [http://judiciary.house.gov/hearings/mark\\_12012011.htm](http://judiciary.house.gov/hearings/mark_12012011.htm).

<sup>6</sup> The 110<sup>th</sup> Congress saw the introduction of the Effective Corruption Prosecutions Act of 2007 (S. 118 /H.R. 1872), offered by Sen. Leahy and Rep. Johnson of Georgia, respectively. During the same Congress, the Senate Judiciary Committee approved the Public Corruption Prosecution Improvement Act, S.Rept. 110-239 (2007). In the 111<sup>th</sup> Congress, the committee also approved, without written report, the Public Corruption Prosecution Improvements Act (S. 49), 155 Cong. Rec. S3073 (daily ed. March 12, 2009). Related proposals in the 111<sup>th</sup> Congress included the Clean Up Government Act of 2009 (H.R. 1825)(Rep. Jordan of Ohio); the Public Corruption Prosecution Improvements Act (H.R. 2822)(Rep. Johnson of Georgia); and the Honest Services Restoration Act (H.R. 6391/S. 3854)(Sen. Leahy/Rep. Weiner). Hearings were held in the 111<sup>th</sup> Congress and in this Congress: *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision, Hearing Before the Senate Comm. on the Judiciary*, 111<sup>th</sup> Cong., 2d sess. (2010); *H.R. 2572, The "Clean Up Government Act of 2011": Hearing Before the House Judiciary Subcomm. on Crime, Terrorism, and Homeland Security*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess. (2011).

<sup>7</sup> *Skilling v. United States*, 130 S.Ct. 2896, 2907 (2010)(holding that honest services mail and wire fraud covers only bribery and kickbacks); *United States v. Sun Diamond Growers of California*, 526 U.S. 398, 414 (1999)(holding that conviction under the illegal gratuities subsection of the bribery statute required a showing that the gratuity was given in appreciation of a particular official act); *Valdes v. United States*, 475 F.3d 1319, 1324 (D.C. Cir. 2007)(holding that official act for purposes of the bribery and illegal gratuities statute refers to matters presented to the government for disposition).

# Mail and Wire Fraud

## Public Officials: Undisclosed Self-Dealing

Title II and its House companion would outlaw undisclosed self-dealing as a form of mail and wire fraud.<sup>8</sup> The proposal represents the latest renovation of the mail and wire fraud statutes constructed in response to more circumspect Supreme Court interpretation of those provisions. Federal public corruption statutes have a long history. Federal bribery statutes date back almost to the dawn of the Republic.<sup>9</sup> The mail fraud statute, which forbids the use of the mail in conjunction with a scheme to defraud another of money or property, originated in the mid-eighteenth century.<sup>10</sup> The mail fraud statute's companion, the wire fraud statute, was enacted in the mid-twentieth century.<sup>11</sup> Shortly thereafter, federal officials had begun to prosecute corrupt state and local officials under the federal mail and wire fraud statutes.<sup>12</sup> Application of the statutes to public corruption was based on the theory that the mail and wire fraud statutes protected both tangible as well as intangible property and that such intangible property included the right of an employer or the public to the honest services of an employee or public official:

An increasing number of courts ... have held that a recreant employee can be prosecuted [for mail fraud] under §1341 if he breaches his allegiance to his employer by accepting bribes or kickbacks in the course of his employment, since such conduct defrauds the employer of his right to the employee's honest and faithful services. Similar schemes devised by public officials have been viewed as defrauding state or municipal citizens of the same intangible right.<sup>13</sup>

The Supreme Court, however, found that interpretation too open ended. In *McNally*, it declared that, “[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read §1341 as limited in scope to the protection of property rights.”<sup>14</sup>

Congress answered *McNally* with the enactment of 18 U.S.C. 1346, which defines the term “scheme to defraud” in mail and wire fraud statutes to include schemes to “deprive another of the intangible right to honest services.”

Faced with vagueness challenges, the lower federal courts devised a number of standards to limit the scope of honest services mail and wire fraud.<sup>15</sup> Rather than endorse any of these standards, the

<sup>8</sup> Title II, §211 (proposed 18 U.S.C. 1346A); H.R. 2572, §15 (proposed 18 U.S.C. 1346A).

<sup>9</sup> E.g., §21, Act of April 30, 1790, 1 Stat. 117 (1790).

<sup>10</sup> §302 of the Act of June 8, 1872, 17 Stat. 323 (1872).

<sup>11</sup> §18 of the Act of July 16, 1956, 66 Stat. 722 (1952).

<sup>12</sup> E.g., *United States v. McNeive*, 536 F.2d 1245 (8<sup>th</sup> Cir. 1976)(city plumbing inspector); *United States v. Brown*, 540 F.2d 364 (8<sup>th</sup> Cir. 1976)(city building commissioner); *United States v. Mandel*, 591 F.2d 1347 (4<sup>th</sup> Cir. 1979)(state governor).

<sup>13</sup> *United States v. McNeive*, 536 F.2d at 1249 (here and hereafter internal citations and quotation marks are generally omitted).

<sup>14</sup> *McNally v. United States*, 483 U.S. 350, 360 (1987).

<sup>15</sup> E.g., *United States v. Sorich*, 523 F.3d 702, 708-709 (7<sup>th</sup> Cir. 2008)(emphasis added)(public corruption honest services fraud requires proof of an intent to “deprive a governmental entity of the honest services of its employees for personal gain to a member of the scheme or another”); *United States v. Brumley*, 116 F.3d 728, 734-36 (5<sup>th</sup> Cir. 1997) (holding a public servant's honest services fraud must involve a violation of some obligation imposed by state law); *United States v. Frost*, 125 F.3d 346, 368 (6<sup>th</sup> Cir. 1997)(honest services fraud requires a showing “that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of” his failure

Supreme Court in *Skilling* opted for a narrow construction of honest services fraud. It concluded that “[i]n proscribing fraudulent deprivations of ‘the intangible right to honest services,’ §1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning ... would encounter a vagueness shoal.”<sup>16</sup> As it had done in *McNally*, the Court in *Skilling* urged Congress to speak clearly should it elect to expand the reach of honest services mail and wire fraud.<sup>17</sup>

H.R. 2572 and Title II would each expand the mail and wire fraud definition of the term “scheme to defraud” to include a scheme “by a public official to engage in undisclosed self-dealing.”<sup>18</sup> The proposals would cover federal, state, and local officials, employees, and agents.<sup>19</sup> “Undisclosed self-dealing” has two components in the bills. One involves a conflict of interest; the other an obligation to disclose it.

The first encompasses a public official’s performance of an official act for the purpose, at least in material part, of furthering his own financial interest or that of a spouse, minor child, close business associate, or in some instances, that of someone from whom the official has received something of value.<sup>20</sup> Official acts include those actions, decisions, and courses of action that come within the official’s duties.<sup>21</sup>

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to provide honest services). For a more detailed discussion see CRS Report R40852, *Deprivation of Honest Services as a Basis for Federal Mail and Wire Fraud Convictions*, by Charles Doyle.

<sup>16</sup> *Skilling v. United States*, 130 S.Ct. 2896, 2907 (2010).

<sup>17</sup> *Skilling v. United States*, 130 S.Ct. at 2933 (n. 45 of the opinion in brackets)(“‘If Congress desires to go further,’ we reiterate, ‘it must speak more clearly than it has.’” *McNally*, 483 U.S. , at 360. [If Congress were to take up the enterprise of criminalizing ‘undisclosed self-dealing’ by a public official or private employee, it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns. The Government proposes a standard that prohibits the ‘taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty,’ so long as the employee acts with a specific intent to deceive and the undisclosed conduct could influence the victim to change its behavior. That formulation, however, leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.]”).

<sup>18</sup> H.R. 2572, §15(a)(proposed 18 U.S.C. 1346A); Title II, §211(a)(proposed 18 U.S.C. 1346A).

<sup>19</sup> “The term ‘public official’ means an officer, employee, or elected or appointed representative, or person acting for or on behalf of the United States, a State, or a subdivision of a State, or any department, agency or branch of government thereof, in any official function, under or by authority of any such department, agency, or branch of government,” H.R. 2572, §15(a)(proposed 18 U.S.C. 1346A(b)(2)); Title II §211(a)(proposed 18 U.S.C. 1346A(b)(2)).

<sup>20</sup> “The term ‘undisclosed self-dealing’ means that – (A) a public official performs an official act for the purpose, in whole or in material part, of furthering or benefitting a financial interest, of which the public official has knowledge, of – (i) the public official; (ii) the spouse or minor child of a public official; (iii) a general business partner of the public official; (iv) a business or organization in which the public official is serving as an employee, officer, director, trustee, or general partner; (v) an individual, business, or organization with whom the public official is negotiating for, or has any arrangement concerning, prospective employment or financial compensation; or (vi) an individual, business, or organization from whom the public official has received any thing or things of value, otherwise than as provided by law for the proper discharge of official duty, or by rule or regulation,” H.R. 2572, §15(a)(proposed 18 U.S.C. 1346A(b)(4)(A)); Title II, §211(a)(proposed 18 U.S.C. 1346A(b)(4)(A)).

<sup>21</sup> “The term ‘official act’ – (A) means any act within the range of official duty, and any decision, *recommendation*, or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official’s official capacity or in such official’s place of trust or profit; and (B) may be a single act, more than one act, or a course of conduct,” H.R. 2572, §15(a)(proposed 18 U.S.C. 1346A(b)(1))(language in italics appears only in the House bill); Title II §211(a)(proposed 18 U.S.C. 1346(b)(1)).

The second element of undisclosed self-dealing consists of the public official's knowingly failing to disclose material information that he is required by law to disclose.<sup>22</sup> "Material information," as the term is used in the second element is defined to include information relating to pertinent financial matters of the covered officials and those covered by virtue of their relation to those officials.<sup>23</sup>

The proposal defines neither "material," "any thing or things of value," nor "financial interest," as those terms are used in the first element. The omissions may not be problematic. In the absence of a statutory definition, interpretation begins with the ordinary meaning of a term,<sup>24</sup> and may take into account how the term is defined or understood in similar contexts.<sup>25</sup> The dictionary describes "material" as something "having real importance or great consequences."<sup>26</sup> In the context of other statutes relating to fraudulent conduct, something is considered material "if it has a natural tendency to influence" a decision.<sup>27</sup> The bills speak of a public official performing an act for "the purpose, in whole or in *material* part, of furthering or benefitting a financial interest." This would seem to mean that an intent to further or benefit a particular financial interest must play an important or influential part in the official's decision to perform the act.

The terms "thing of value," or "anything of value" are likewise used with some regularity elsewhere in federal criminal law.<sup>28</sup> There is some suggestion that "anything of value" should be read more broadly as "all things of value."<sup>29</sup> In any event, the terms "thing of value" and "anything of value" are understood to refer to a diverse range of both tangible and intangible things including campaign contributions, employment, sex, expunged criminal records, and casual pretrial release supervision.<sup>30</sup>

<sup>22</sup> "The term 'undisclosed self-dealing' means that ... (B) the public official knowingly falsifies, conceals, or covers up material information that is required to be disclosed by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official, or the knowing failure of the public official to disclose material information in a manner that is required by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official," H.R. 2572, §15(a)(proposed 18 U.S.C. 1346A(b)(4)(B)); Title II, §211(a)(proposed 18 U.S.C. 1346A(b)(4)(B)).

<sup>23</sup> "The term 'material information' includes information – (A) regarding a financial interest of a person described in clauses (i) through (iv) paragraph (4)(A); and (B) regarding the association, connection, or dealings by a public official with an individual, business, or organization as described in clauses (iii) through (vi) of paragraph 4," H.R. 2572, §16(a)(proposed 18 U.S.C. 1346A(b)(5)); S. 401, §18(a)(proposed 18 U.S.C. 1346A(b)(1)).

<sup>24</sup> *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S.Ct. 1885, 1891 (2011); *United States v. Santos*, 553 U.S. 507, 511 (2008).

<sup>25</sup> *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *United States v. Nader*, 542 F.3d 713, 717 (9<sup>th</sup> Cir. 2008).

<sup>26</sup> MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, 717 (10<sup>th</sup> ed. 1996).

<sup>27</sup> *Neder v. United States*, 527 U.S. 1, 15 (1999); *United States v. Gaudin*, 515 U.S. 506, 509 (1995); *Kungys v. United States*, 485 U.S. 759, 770 (1988).

<sup>28</sup> The term "thing of value" is found in more than 20 sections of title 18 alone, e.g., 18 U.S.C. 210 (offer to procure appointive public office); 641 (theft of U.S. property); 876 (extortionate threats); 1030 (computer extortion); 2113 (bank robbery). "Anything of value," appears almost as regularly, e.g., 18 U.S.C. 201 (bribery); 666 (theft of federal property); 1030 (computer fraud); 1591 (sex trafficking).

<sup>29</sup> *United States v. Townsend*, 630 F.3d 1003, 1010 (11<sup>th</sup> Cir. 2011) ("The United States Supreme Court and this Court have recognized on many occasions that the word 'any' is a powerful and broad word, that that it does not mean 'some' or 'all but a few,' but instead means 'all'").

<sup>30</sup> E.g., *United States v. Siegelman*, 640 F.3d 1159, 1172 (11<sup>th</sup> Cir. 2011) ("In this case, the jury was instructed that they could not convict the defendants of bribery unless they found that 'the Defendant and official agreed that the official will take specific action in exchange for a thing of value.' This instruction required the jury to find an agreement to exchange a specific official action for a campaign contribution.... [W]e find no reversible error in the bribery instruction given by the district court"); *United States v. Douglas*, 634 F.3d 852, 858 (6<sup>th</sup> Cir. 2011) (employment in a high paying job is a thing of value); *United States v. Moore*, 525 F.3d 1033, 1047-48 (11<sup>th</sup> Cir. 2008) (upholding bribery



The meaning of “financial interest” may be a little less transparent. It is not a term regularly used or defined in federal criminal law, but it is a familiar concept in federal conflict of interest provisions.<sup>31</sup> A Justice Department witness emphasized this point when she testified at a congressional hearing on the House bill, “[I]n order to define the scope of the financial interests that underlie improper self-dealing, the provision draws content from the well-established federal conflict-of-interest statute, 18 U.S.C. §208, which currently applies to the federal Executive Branch.”<sup>32</sup> Perhaps more to the point, the proposed undisclosed self-dealing section only applies to those financial interests which the law obligates the public official to disclose. The qualifying reporting statute or regulation would ordinarily make clear the financial interests whose disclosures it requires.

In the Justice Department’s endorsement of the proposal the same witness testified that, “[U]nder the proposed statute, no public official could be prosecuted unless he or she knowingly conceals, covers up, or fails to disclose material information that he or she is already required by law or regulation to disclose. Because the bill would require the government to prove knowing concealment *and* that any defendant acted with the specific intent to defraud, there is no risk that a person can be convicted for unwitting conflicts of interest or mistakes.”<sup>33</sup>

A representative of the criminal defense bar, however, criticized the proposal as constitutionally suspect, contrary to federalism principles, duplicative, and overly simplistic. He argued that the section fails to heed *Skilling* Court’s plea for clarity.<sup>34</sup> He envisioned First Amendment

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conviction of prison guard who traded contraband for sex); *United States v. Townsend*, 630 F.3d at 1010 (“The bribes were given in connection with Febles’ freedom on pretrial release.... [I]ntangibles, such freedom and incremental increases in it, may be considered ‘any thing of value’.... See *United States v. Hines*, 541 F.3d 833, 836-37 (8<sup>th</sup> Cir. 2008)(deputy sheriff’s prompt assistance in offering his services for evictions was a thing of value); *United States v. Zimmerman*, 509 F.3d 920, 926-27 (8<sup>th</sup> Cir. 2007)(city councilman’s favorable recommendation to zoning committee was thing of value); *United States v. Fernandes*, 272 F.3d 938, 944 (7<sup>th</sup> Cir. 2001);(prosecutor’s expungement of convictions constituted a thing of value); *United States v. Zwick*, 199 F.3d 672, 690 (3d Cir. 1999)(township commissioner’s vote to approve permits was a thing of value)”).

<sup>31</sup> E.g., 18 U.S.C. 208 (acts affecting personal financial interests); 28 U.S.C. 455 (judicial recusal); 5 U.S.C. App. 4 (Ethics in Government Act)

<sup>32</sup> *H.R. 2572, The “Clean Up Government Act of 2011”: Hearing Before the House Judiciary Subcomm. on Crime, Terrorism, and Homeland Security*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess. (2011)(House hearing)(statement of Dep. Ass’t Att’y Gen. Mary Partice Brown)(Brown testimony).

<sup>33</sup> *Id.* (emphasis in the original).

<sup>34</sup> House hearing (statement of Timothy P. O’Toole on behalf of the National Association of Criminal Defense Lawyers)(O’Toole testimony)(“In its *Skilling* decision, every member of the Supreme Court made clear the problematic nature of this ‘undisclosed conflict of interest’ theory of criminal liability, with Justices Scalia, Thomas and Kennedy voting to strike down the entire statute as unconstitutionally vague on its face. In fact, the Court specifically cautioned Congress about the due process concerns inherent in any attempt to revive this theory, and identified a host of troubling and unanswered questions in a proposal set forth by the Department of Justice in its Supreme Court briefing—a proposal that closely resembles §16. As the Court explained, the government’s ‘formulation leaves many questions unanswered.’ And yet, a comparison of the questions posed by the Court in its *Skilling* decision with the language proposed in §16 illustrates that this bill would be subject to the same criticism because it too leaves many of the same questions unanswered. The proposed legislation, for example, ignores the Supreme Court’s concerns about (1) the need to define clearly the ‘significance’ of the conflicting financial interest (‘how direct or significant does the conflicting financial interest have to be?’); (2) the need to clearly define the extent to which the official action has to further that interest to rise to the level of fraud (‘To what extent does the official action have to further that interest in order to amount to fraud?’); and (3) the need to clearly define the scope of the disclosure duty (‘to whom should the disclosure be made and what should it convey?’). As a result, this section does not conform with the Supreme Court’s directive in *Skilling* about the need to exercise ‘particular care in attempting to formulate an adequate criminal prohibition’ if Congress decided to take up the issue again, and it is highly doubtful that this statute could overcome the serious due process concerns identified by the Court in *Skilling*.”)

“The Supreme Court’s questions are not addressed by the addition of paragraph five, which purports to limit the



implications in the proposal's application to campaign contributions to elected officials.<sup>35</sup> He also characterized the proposal as a "classic example of overcriminalization" that would replicate existing law and intrude upon state prerogatives.<sup>36</sup> Finally, the witness contended that the proposal is at odds with the realities of part-time legislators and other state and local officials.<sup>37</sup>

Even after *Skilling*, the honest services mail and wire fraud statutes reach bribery and kickbacks, and the statutes unadorned reach money and property-depriving schemes. The proposal would

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disclosure requirements to 'material information.' First, this requirement seems directed only toward the Supreme Court's concern about defining what must be disclosed and to whom; importantly, it does not address concerns about the lack of definition concerning the scope of the financial interest that triggers the duty of disclosure, nor does it address concerns about what, if any, connection exists between the financial interest and the official act. But even with respect to the disclosure duty, the 'material information' requirement does not narrow the scope of the obligations significantly. While it does define the material disclosure obligations to 'include' information regarding the self-dealing, it is not limited to such information. Thus, the bill's definition of what sorts of non-disclosures violate the statute seems to include other information, presumably unrelated to any self-dealing, which could be deemed material. This level of broadness, even in the most specific section of the bill, is unlikely to satisfy the Supreme Court's concerns raised in the *Skilling* opinion").

<sup>35</sup> *Id.* ("One final concern is raised by Section 16's paragraph (4)(A)(vi), which includes within the scope of 'undisclosed self-dealing' any actions taken by a public official to further the interest of an 'individual, business or organization from whom the public official has received any thing or things of value.' On its face, such a provision *could* sweep within its reach any individual, business or organization from whom the public official has received a *bona fide* campaign contribution, by defining it as 'self-dealing' for an official to take actions that benefit campaign contributors. Doing so creates a sweepingly broad definition of 'self-dealing,' and potentially raises serious constitutional issues, since the Supreme Court has made clear that a public corruption prosecution premised on campaign contributions presents complicated First Amendment issues in our system of privately financed elections").

<sup>36</sup> *Id.* ("[T]he proposed new federal law also is another classic example of overcriminalization, overlapping with the many dozens of other federal criminal laws that already reach corrupt conduct by public officials. Indeed, even without mentioning the honest services fraud law, the Supreme Court has already observed that potentially corrupt behavior of public officials is governed by an 'intricate web of regulations, both administrative and criminal.' ... Section 16 merely duplicates these already-existing prohibitions, which already carry extensive penalties. It is hard to identify any conduct that could not be reached by these existing laws that would be reached by the proposed one, except for innocuous conduct that everyone agrees should not be criminal at all (like a public employee who phones in sick in order to see a ball game because he wants to avoid having his salary docked). A new honest services statute is likewise unnecessary in the state and local context. Many have argued that the primary purpose of reviving a pre-*Skilling* honest services law is to allow federal prosecutors to prosecute corruption that would otherwise be ignored by conflicted and politically weak state and local officials. But federal prosecutors are already able to use existing federal laws such as the Hobbs Act and the Travel Act to reach state and local public corruption and they frequently already do so. In addition, state and local jurisdictions often have their own extensive anti-corruption laws. Using the federal honest services law to essentially displace this extensive state and local regulatory framework—as Section 16 expressly seeks to do—creates potential federalism concerns, as courts have noted, since it essentially allows the federal government to override the numerous laws that state and local governments have adopted to address the conduct of their own officials").

<sup>37</sup> *Id.* ("Finally, state and local jurisdictions often have citizen legislators, who are in a completely different position from the full-time public officials at whom this law appears to be aimed. Take, for example, a state legislator in Texas who, along with his part-time legislative duties, also owns a car dealership. Does this law apply to him when he votes on a state bill to increase highway funding? Such a bill could undoubtedly 'further or benefit' his financial interest—more and better roads may make it easier to get to his dealership or may mean more people buy cars. Assuming Texas has some sort of rule that says that a legislator must file a disclosure before voting on any bill on which he has a conflict of interest, if the legislator does not disclose the "conflict"—maybe because he cannot imagine that that provision applies to him and everybody knows he has a car dealership anyway—he could be vulnerable to federal prosecution. And, the federal prosecutors bringing the prosecution can do so even if, as a matter of Texas practice, no state or local prosecutor has ever applied that provision in such a broad fashion (or even if the punishment for such nondisclosure is administrative or civil). Thus, if Section 16 becomes law, federal prosecutors get to decide what state and local disclosure rules mean, and get to bring one-size-fits-all prosecutions without any understanding of the state and local jurisdictions in which these prosecutions are brought").

add unreported self-dealing in public corruption cases. It leaves unchanged the law governing self-dealing in private cases.

## Bribery and Gratuity Changes

### Section 201

The bills also seek to overcome *Sun Diamond* and *Valdes*, two judicial interpretations of the basic federal bribery and illegal gratuities statute, 18 U.S.C. 201.<sup>38</sup> Subsection 201(b) outlaws soliciting or offering anything of value in exchange for an official act. Subsection 201(c) outlaws soliciting or offering anything of value in gratitude (“for or because of”) for the performance of an official act. The distinction between the two is the corrupt bargain, the illicit *quid pro quo*, that marks bribery.<sup>39</sup>

The issue in *Sun Diamond* was whether an illegal gratuities conviction might be based solely on gifts given a public official because of his office, without reference to any particular official act, or whether the conviction could only stand if gifts were sought or provided with a specific official act in mind.<sup>40</sup> The Supreme Court unanimously concluded that “in order to establish a violation of 18 U.S.C. §201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific ‘official act’ for or because of which it was given.”<sup>41</sup> Justice Scalia, writing for the Court, asserted this construction, along with the definition of a qualifying “official act,” precluded unintended application of the gratuities subsection:

Besides thinking that this is the more natural meaning of §201(c)(1)(A), we are inclined to believe it correct because of the peculiar results that the Government’s alternative reading would produce. It would criminalize, for example, token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits. Similarly, it would criminalize a high school principal’s gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter’s visit to the school. That these examples are not fanciful is demonstrated by the fact that counsel for the United States maintained at oral argument that a group of farmers would violate §201(c)(1)(A) by providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy—so long as the Secretary had before him, or had in prospect, matters affecting the farmers. Of course the Secretary of Agriculture *always* has before him or in prospect matters that affect farmers, just as the President always has before him or in prospect matters that affect college and professional sports, and the Secretary of Education matters that affect high schools.<sup>42</sup>

<sup>38</sup> The self-dealing proposals would apply to federal, state, and local public officials, H.R. 2572, §15(a)(proposed 18 U.S.C. 1346A(b)(2); Title II, §211(a)(proposed 18 U.S.C. 1346A(b)(2). §201 and the proposed amendments speak only of misconduct associated with officials and employees of the United States or District Columbia, 18 U.S.C. 201(a)(1).

<sup>39</sup> *United States v. Sun Diamond Growers of California*, 526 U.S. 398, 404–405 (1999)(emphasis of the Court)(“The distinguishing feature of each crime is its intent element. Bribery requires an intent ‘influence’ an official act, while illegal gratuity requires only that the gratuity be given or accepted ‘for or because’ of an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act”).

<sup>40</sup> *Id.* at 400.

<sup>41</sup> *Id.* at 414.

<sup>42</sup> *Id.* at 406–407.

The official act requirement plays no less significant a role in avoiding unintended coverage, for as the Court observed

It might be said in reply to this that the more narrow interpretation of the statute can also produce some peculiar results. In fact, in the above-given examples, the gifts could easily be regarded as having been conferred, not only because of the official's position as President or Secretary, but also (and perhaps principally) "for or because of" the official acts of receiving the sports teams at the White House, visiting the high school, and speaking to the farmers about USDA policy, respectively. The answer to this objection is that those actions—while they are assuredly "official acts" in some sense—are not "official acts" within the meaning of the statute, which, as we have noted, defines "official act" to mean "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. §201(a)(3). Thus, when the violation is linked to a particular "official act," it is possible to eliminate the absurdities *through the definition of that term*. When, however, no particular "official act" need be identified, and the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, nothing but the Government's discretion prevents the foregoing examples from being prosecuted.<sup>43</sup>

The bills would enlarge both the illegal gratuities prohibition and the definition of "official acts" that constitute elements of the bribery as well as the illegal gratuities offense. They would also devise alternative means of avoiding the type of unintended results mentioned in *Sun Diamond*.

First, they would amend the proscriptions of subsection 201(c) to prohibit offering or soliciting a gift for or because of "the official's or person's official position," in order to supplement the existing prohibition against gifts for or because of an "official act."<sup>44</sup> The amendment would bring within the scope of the illegal gratuities subsection "status" and "good will" gifts and contributions, without requiring prosecutors to show that they were sought or provided with an eye to any specific official act. As the committee report from the earlier Congress explained, "This [would] allow the statute to reach its intended range of corrupt conduct, including benefits flowing to public officials designed to curry favor for non-specified future acts or to build a reservoir of good will."<sup>45</sup>

Second, they would amend the gratuities offense to create a safe harbor for gifts and campaign contributions permitted by rule or regulation, a term which the bills would define for both bribery and illegal gratuities purposes.<sup>46</sup> The earlier committee report noted that in any event most campaign contributions would not be implicated by the gratuities prohibition. It explains that the prohibition is confined to things given to the official personally, and that campaign contributions ordinarily are not.<sup>47</sup> The report also confirmed that the exception would help avoid the "horribles" found in Justice Scalia's *Sun Diamond* opinion.<sup>48</sup> Yet the report may have introduced a hint of

<sup>43</sup> *Id.* at 407-408 (emphasis of the Court).

<sup>44</sup> H.R. 2572, §8; Title II, §205(b).

<sup>45</sup> S.Rept. 110-239, at 6 (2007).

<sup>46</sup> H.R. 2572, §5(3)(B); Title II, §205(b). The definition would be added to 18 U.S.C. 201(a)(4) ("[T]he term 'rule or regulation' means a Federal regulation or a rule of the House of Representatives or the Senate, including those rules and regulations governing the acceptance of campaign contributions"), H.R. 2572, §5(1)(C); Title II, §205(a)(3).

<sup>47</sup> S.Rept. 110-239, at 7 n.7 (2007).

<sup>48</sup> *Id.* at 7 ("To foreclose unrestrained prosecutorial discretion in this sensitive area in the law, however, the bill also provides an additional protection that was not included in the original gratuities statute, and that responds to concerns that contributed to the Sun-Diamond Court's decision to restrict the reach of the statute. Specifically, the bill creates a safe harbor for Government officials who accept things of value pursuant to applicable rule or regulation. This carve-

ambiguity in the exception when it suggested that rules or regulations would rest beyond the pale, if they left the particulars of an exception to individual Member or agency discretion.<sup>49</sup>

Third, the bills would establish a \$1,000 threshold for the illegal gratuities offenses, although each does so in its own distinctive manner. H.R. 2572 would limit the offenses in 18 U.S.C. 201—bribery and illegal gratuities alike—to cases involving \$1,000 or more.<sup>50</sup> Title II would apply the \$1,000 limitation only in the case of illegal gratuity status gifts.<sup>51</sup>

Finally, the bills would amend the definition of “official act,” applicable to both the bribery and gratuities offenses, as to encompass activities “within the range” of official duty.<sup>52</sup> The change is

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out responds to the examples Justice Scalia set out in *Sun-Diamond* of de minimis gifts that, as the law stood in 1999, could have triggered the gratuities statute, by exempting from prosecution for gratuities all benefits accepted by public officials that are permitted by rules or regulations. This new provision squarely addresses Justice Scalia’s parade of horrors in *Sun-Diamond* by constraining prosecutorial discretion in cases where federal prosecution would clearly be inappropriate”).

<sup>49</sup> *Id.* at 7 n.6 (emphasis added)(“This safe harbor is intended to include only duly enacted federal regulations and duly enacted Rules of the House of Representatives and the United States Senate, see, e.g., Standing Rules of the Senate, S. Doc. No. 110-9 (2007), and *is not intended to include other operating procedures and policies established by individual offices, departments, or agencies of the Government*”).

<sup>50</sup> H.R. 2572, §5(3), (4). See e.g., proposed 18 U.S.C.(c)(“Whoever - (1) otherwise than as provided by law for the proper discharge of official duty, *or by rule or regulation knowingly* - (A) directly or indirectly gives, offers, or promises ~~anything of value~~ *any thing or things of value of not less than \$1,000* to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or (B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept ~~anything of value~~ *any thing or things of value of not less than \$1,000* personally for or because of any official act performed or to be performed by such official or person; (2) directly or indirectly, gives, offers, or promises ~~anything of value~~ *any thing or things of value of not less than \$1,000* to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person’s absence therefrom; (3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept ~~anything of value~~ *any thing or things of value of not less than \$1,000* personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person’s absence therefrom; shall be fined under this title or imprisoned for not more than ~~two years~~ *five years*, or both”). §5(4) of H.R. 2572 would establish comparable \$1,000 limits for the bribery provisions of 18 U.S.C. 201(b).

<sup>51</sup> Title II, §205(b) would rewrite 18 U.S.C. 201(c)(1)(emphasis added) as follows: “Whoever - (1) otherwise than as provided by law for the proper discharge of official duty, or by rule or regulation - (A) directly or indirectly gives, offers, or promises any thing or things of value to any public official, former public official, or person selected to be a public official for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; (B) directly or indirectly, knowingly gives, offers, or promises any thing or things of value with an aggregate value **of not less than \$1000** to any public official, former public official, or person selected to be a public official for or because of the official’s or person’s official position; (C) being a public official, former public official, or person selected to be a public official, directly or indirectly, knowingly demands, seeks, receives, accepts, or agrees to receive or accept any thing or things of value with an aggregate value **of not less than \$1000** for or because of the official’s or person’s official position; or (D) being a public official, former public official, or person selected to be a public official, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept any thing or things of value for or because of any official act performed or to be performed by such official or person.”

<sup>52</sup> H.R. 2572, §8; Title II, §205(a). Proposed 18 U.S.C. 201(a)(3)(language which the bills would add in italics; language which only H.R. 2572 would add in bold)(“[T]he term ‘official act’ - (A) means any act *within the range of official duty*, and any decision, **recommendation**, or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official’s capacity or in such official’s place of trust or profit; and (B) *may be a single act, more than 1 act, or a course of conduct*”).

designed to repudiate the construction of the term “official act” announced by the D.C. Court of Appeals in *Valdes*. *Valdes*, a police officer, had received cash in connection with license plate identification and outstanding warrant information he had provided an informant he believed to be a judge.<sup>53</sup> Indicted for bribery, *Valdes* was convicted of the lesser included offense of receiving an illegal gratuity.<sup>54</sup> The Court of Appeals reversed, declaring, “§201 is not about officials’ moonlighting, or their misuse of government resources, or the two in combination.”<sup>55</sup> Instead, the term “any question, matter, cause, suit, proceeding or controversy” in the definition of official act “refers to a class of questions or matters whose answer or disposition is determined by the government,” the court held.<sup>56</sup> Not every subsequent federal appellate court has concurred.<sup>57</sup> The phrase “any act within the range of official duty,” is designed to overcome the *Valdes* interpretation of “official act,” and “to ensure that the bribery statute applies to all conduct of a public official within the range of the official’s duties.”<sup>58</sup>

The bills would add the term “course of conduct” to the definition of official act to avoid requiring prosecutors to “establish a one-to-one link between a specific payment and a specific official act.”<sup>59</sup> The change would apply to both bribery and illegal gratuity offenses.<sup>60</sup> The bills’ illegal gratuity subsection would feature a safety valve for campaign contributions. The bribery subsection would not. Yet, bribery would be prosecutable only in the presence of a corrupt proposal to influence official conduct in exchange of something of value.<sup>61</sup>

## Section 666

Section 666 outlaws bribery, embezzlement, and other forms of theft, involving more than \$5,000, in relation to federal programs. The bills propose several changes in the language of Section 666. They would lower the threshold for federal prosecution from \$5,000 to \$1,000.<sup>62</sup> The new threshold corresponds to that found in the statute that outlaws embezzlement or other theft of

<sup>53</sup> *Valdes v. United States*, 475 F.3d 1319, 1320 (D.C. Cir. 2007).

<sup>54</sup> *Id.* at 1322.

<sup>55</sup> *Id.* at 1324.

<sup>56</sup> *Id.*

<sup>57</sup> *United States v. Moore*, 525 F.3d 1033, (11<sup>th</sup> Cir. 2008), quoting *United States v. Birdsall*, 233 U.S. 223, 230 (1909) (“Every action that is within the range of official duty comes within the purview of these sections”).

<sup>58</sup> House hearings, Brown testimony; see also, S.Rept. 110-239, at 7-8 (2007).

<sup>59</sup> “The bill also closes a potential loophole by clarifying bribery law in cases where there is an on-going stream of financial benefits flowing from a private source to a public official. In such cases, it may be impossible to establish a one-to-one link between a specific payment and a specific official act. No circuit presently requires such a one-to-one showing, but to avoid confusion and unnecessary litigation, the bill clarifies that a corrupt payment can be made to influence more than one official act, and, to the same end, that a series of such payments may be made to influence a public official in performing a series of official acts.... Congress should leave no doubt that a bribery charge cannot be defeated merely because the government cannot match up each specific payment in a series with specific official acts,” S.Rept. 111-239, at 8 (2007).

<sup>60</sup> The term “official act” appears in both the bribery and illegal gratuities subsections of 18 U.S.C. 201.

<sup>61</sup> 18 U.S.C. 201(b)(“Whoever (1) ... corruptly ... offers ... anything of value to any public official ... with intent - (A) to influence any official act ... [or] (2) being a public official ... corruptly demands ... anything of value ... in return for: (A) being influenced in the performance of any official act ... shall be fined under this title....”).

<sup>62</sup> H.R. 2572, §3(2); Title II, §203(2).



federal property.<sup>63</sup> The defense bar contends, however, that the modification would undo a limitation imposed in the interest of federalism and to avoid federal over criminalization.<sup>64</sup>

The bills would increase the maximum term of imprisonment associated with the offense from, 10 to 20 years.<sup>65</sup> The new maximum would match those under the mail and wire fraud statutes<sup>66</sup> as well as the 20-year maximum that the bills would establish for the bribery of federal officials under Section 201.<sup>67</sup>

Section 666's bribery components now outlaw corruptly offering or soliciting "anything of value." The term would become "any things of value."<sup>68</sup> The adjustment is apparently offered to confirm that the prohibitions apply to cases involving a series of payments.<sup>69</sup> The bills would emphasize the point with a change in the language that removes salaries and other forms of legitimate compensation and reimbursement from the list of tainted payments.<sup>70</sup>

## Embezzlement and Other Theft of Federal and District of Columbia Property

Section 641 outlaws the embezzlement or other theft of money or anything else of value belonging to the United States or one of its agencies or departments.<sup>71</sup> The District of Columbia Code outlaws embezzlement or other forms of theft, regardless of the victim.<sup>72</sup> Violations of the

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<sup>63</sup> 18 U.S.C. 641.

<sup>64</sup> House hearing, O'Toole testimony ("Section 4 lowers the existing statutory monetary threshold from \$5,000 to \$1,000 for a violation of 18 U.S.C. §666(a) (theft or bribery concerning receipt of Federal funds), which carries an existing ten year maximum sentence. Lowering the existing statutory monetary threshold from \$5,000 down to \$1,000 is problematic. 'The monetary threshold requirements of [S]ection 666 constitute a significant limitation on the otherwise broad scope of the statute. Congress included these restricting features to insure against an unwarranted expansion of Federal jurisdiction into areas of little Federal interest [quoting S. REP. NO. 307, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. 726 (1981)]. Moreover, 'Congress limited the scope of [S]ection 666 to crimes involving substantial monetary amounts in order to curtail excessive federal intervention into state and local matters.' Daniel N. Rosenstein, Section 666: The Beast in the Federal Criminal Arsenal, 39 Cath. U. L. Rev. 673, 686 (1990) (citing S. REP. NO. 225 98<sup>th</sup> Cong., 2d Sess. 370 (1984)). Unfortunately, if passed, this bill will also increase the statutory maximum term of imprisonment to twenty years for anyone subject to this newly expanded criminal law").

<sup>65</sup> H.R. 2572, §3(1); Title II, §203(1).

<sup>66</sup> 18 U.S.C. 1341, 1343.

<sup>67</sup> H.R. 2572, §6(2). S. 401, §7(1).

<sup>68</sup> H.R. 2572, §4(3), (4). S. 401, §5(1)(A)(i), (B).

<sup>69</sup> S.Rept. 110-239, at 8 (2007)(footnote 10 of the report in brackets)("No circuit presently requires such a one-to-one showing, but to avoid confusion and unnecessary litigation, the bill clarifies that a corrupt payment can be made to influence more than one official act, and, to the same end, that a series of such payments may be made to influence a public official in performing a series of official acts. [The bill makes this same clarification to the statute governing federal prosecution of state and local bribery, 18 U.S.C. §666, and it lowers the transactional threshold for §666 bribery prosecutions from \$5,000 to \$1,000.]").

<sup>70</sup> H.R. 2572, §17; Title II, §213 (Proposed 18 U.S.C. 666(c)(~~This section does not apply to~~ *The term 'any thing or things of value' that is corruptly solicited, demanded, accepted, or agreed to be accepted in subsection (a)(1)(B) or corruptly given, offered, or agreed to be given in subsection (a)(2) shall not include bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business*)).

<sup>71</sup> 18 U.S.C. 641.

<sup>72</sup> D.C. Code §22-3211.

D.C. provision carry a maximum 10-year term of imprisonment, if the value of the property exceeds \$1,000 and a maximum of 180 days in other cases.<sup>73</sup>

The bills would increase the maximum term of imprisonment for a violation of Section 641 from 10 to 20 years.<sup>74</sup> H.R. 2572, unlike Title II, and would also fold the property of the D.C. government and its agencies and departments into the coverage of Section 641.<sup>75</sup> The earlier committee report explained that

The bill also contains a series of long-needed technical fixes to select statutes, as well as targeted increases in statutory maximum penalties for statutes used in public corruption cases. For example, the bill amends the federal theft statute—18 U.S.C. Sec. 641—to bring within its purview the District of Columbia government and its agencies. This change is long overdue in view of the District’s unique status, and it comports with the overarching statutory scheme because the District is already included in the federal bribery statute (18 U.S.C. 201) and the statute governing theft and bribery from programs receiving federal funds (18 U.S.C. 666). The need for this fix is acute: under current law, massive thefts of District of Columbia funds—such as the recent D.C. Tax and Revenue allegations of a \$44 million fraud—cannot be prosecuted on a federal theft theory.<sup>76</sup>

## Penalty Increases

When penalty increases were proposed for various federal public corruption offenses during the 110<sup>th</sup> Congress, the committee report noted that the increases would reflect “the Committee’s view of the serious and corrosive nature of these crimes, and ... harmonize the punishment of these public corruption-related offenses with similar statutes.”<sup>77</sup> Moreover, the committee was of the opinion that “[i]ncreasing penalties in appropriate cases sends a message to would-be criminals and to the public that there are severe consequences for breaching the public trust.”

Reacting to the same proposals replicated in the House and Senate bills, a representative of the defense bar contended that the proposals would “dramatically expand already lengthy prison sentences ... without any evidence of whether such an expansion is necessary or what the costs of such an expansion would be.”<sup>78</sup>

Specifically, the House and Senate bills would increase the maximum term of imprisonment for the following existing federal public corruption offenses:<sup>79</sup>

Offenses	Maximum Term: Now	Maximum Term: Proposed
Bribery/theft in re fed. program, 18 U.S.C. 666(a)	10 years	20 years
Theft of U.S. property, 18 U.S.C. 641	10 years	15 years

<sup>73</sup> D.C. Code §22-3212.

<sup>74</sup> H.R. 2572, §4; Title II, §204.

<sup>75</sup> H.R. 2572, §6.

<sup>76</sup> S.Rept. 110-239, at 9 (2007).

<sup>77</sup> *Id.*

<sup>78</sup> House hearing, O’Toole testimony.

<sup>79</sup> H.R. 2572, §3; Title II, §203(18 U.S.C. 666(a)). H.R. 2572, §4; Title II, §204(18 U.S.C. 641). H.R. 2572, §5(2) only (18 U.S.C. 201(b)). H.R. 2572, §5(3)(A) only (18 U.S.C. 201(c)). H.R. 2572, §11; Title II, §208 (18 U.S.C. 600, 601, 602, 606, 607, 610).



<b>Offenses</b>	<b>Maximum Term: Now</b>	<b>Maximum Term: Proposed</b>
Bribery: U.S. officials, 18 U.S.C. 201(b)	15 years	20 years
Illegal gratuities: U.S. officials, 18 U.S.C. 201(c)	2 years	5 years
Promise of U.S. job for political activity, 18 U.S.C. 600	1 year	3 years
Denial of U.S. benefit for want of political contribution, 18 U.S.C. 601	1 year	3 years
Solicitation of political contributions from fellow U.S. employee, 18 U.S.C. 602(a)(4)	3 years	5 years
Intimidation to secure political contribution, 18 U.S.C. 606	3 years	5 years
Solicitation of political contributions in U.S. buildings, 18 U.S.C. 607(a)	3 years	5 years
Coercion of U.S. employees for political activities, 18 U.S.C. 610	3 years	5 years

## Sentencing Guidelines

Sentencing defendants convicted of federal crimes begins with the Sentencing Guidelines.<sup>80</sup> The court must calculate the sentence recommended by the Guidelines and then weigh the other statutory sentencing factors mentioned in 18 U.S.C. 3553(a).<sup>81</sup> The sentence imposed will survive appellate scrutiny, if it is procedurally and substantively reasonable.<sup>82</sup> A sentence is procedurally reasonable if it is free of procedural error, such as a sentencing beyond the statutory maximum or below any statutory minimum,<sup>83</sup> an incorrect Guideline calculation, failure to consider the factors in subsection 3553(a), or a failure to explain the sentence imposed.<sup>84</sup> A sentence is substantively reasonable if it is appropriate given all the circumstances of the case, including the extent to which the sentence imposed varies from the sentence recommended by the Guidelines.<sup>85</sup>

<sup>80</sup> *Kimbrrough v. United States*, 552 U.S. 38, 49 (2007); *Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Ellis*, 641 F.3d 411, 415 (9<sup>th</sup> Cir. 2011). See CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle.

<sup>81</sup> *Gall v. United States*, 552 U.S. at 49-50; *United States v. Bradley*, 644 F.3d 1213, 1283 (11<sup>th</sup> Cir. 2011); *United States v. Johnson*, 640 F.3d 195, 202-203 (6<sup>th</sup> Cir. 2011); 18 U.S.C. 3553(a) (“Factors To Be Considered in Imposing a Sentence. - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider - (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); (5) any pertinent policy statement - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced[;] (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense”).

<sup>82</sup> *Gall v. United States*, 552 U.S. at 46; *United States v. Courtland*, 642 F.3d 545, 550 (7<sup>th</sup> Cir. 2011); *United States v. Rhine*, 637 F.3d 525, 527 (5<sup>th</sup> Cir. 2011).

<sup>83</sup> *Edwards v. United States*, 523 U.S. 511, 515 (1998) (“[A] maximum sentence set by statute trumps a higher sentence set forth in the Guidelines”); *United States v. Vallar*, 635 F.3d 271, 289 (7<sup>th</sup> Cir. 2011); *United States v. Sutton*, 625 F.3d 526, 528-29 (8<sup>th</sup> Cir. 2010); *United States v. Tepper*, 616 F.3d 583, 587 n.1 (D.C. Cir. 2010). The Guidelines themselves preclude a Guideline recommended sentence of greater than an applicable statutory maximum or less than an applicable statutory mandatory minimum, U.S.S.G. §5G1.1.

<sup>84</sup> *Gall v. United States*, 552 U.S. at 51; *United States v. Apodaca*, 641 F.3d 1077, 1081(7<sup>th</sup> Cir. 2011); *United States v. Rhine*, 637 F.3d 525, 527 (5<sup>th</sup> Cir. 2011).

<sup>85</sup> *Gall v. United States*, 552 U.S. at 51; *United States v. Bradley*, 644 F.3d at 1274 (“All that is required is that the sentence be substantively reasonable, meaning that, in part, it is proportional to such broad notions as the nature and circumstances of the offense and history and characteristics of the defendant, 18 U.S.C. 3553(a)(1)”); *United States v. Apodaca*, 641 F.3d at 1082; *United States v. Johnson*, 640 F.3d at 209.

The bills would direct the United States Sentencing Commission to examine the Guidelines applicable in the case of a conviction under 18 U.S.C. 201 (bribery of federal officials), 641 (theft of federal property), or 666 (theft or bribery in relation to federal programs).<sup>86</sup> The Commission would be instructed to amend the Guidelines consistent with the considerations identified in the bills.<sup>87</sup>

## Related Provisions

### Statute of Limitations

Capital offenses and certain child abduction and sex offenses have no statute of limitations and can be tried at any time.<sup>88</sup> Elsewhere statute of limitations have been established to encourage prompt law enforcement and to avoid the need to defend against stale charges.<sup>89</sup> Most other federal crimes must be prosecuted within five years.<sup>90</sup> The statute of limitations for certain securities fraud cases, for instance, is six years.<sup>91</sup>

The earlier committee report explained that “public corruption cases are among the most difficult and time-consuming cases to investigate and prosecute,” and pointed out that there have been other exceptions to the general five-year rule.<sup>92</sup> Consequently, both bills would establish a six-year statute of limitations for the following public corruption offenses or conspiracies or attempts to commit them.

- 18 U.S.C. 201 (bribery and illegal gratuities involving federal officials or employees)
- 18 U.S.C. 666 (bribery or theft involving federal programs)
- 18 U.S.C. 1341 (mail fraud)(honest services fraud involving public officials only)
- 18 U.S.C. 1343 (wire fraud)(honest services fraud involving public officials only)
- 18 U.S.C. 1951 (Hobbs Act)(extortion under color of official right only)
- 18 U.S.C. 1952 (Travel Act)(bribery cases only)
- 18 U.S.C. 1962 (RICO)(only when the predicate offenses include bribery under state law, or violations of one of the offenses listed above other than the Travel Act).<sup>93</sup>

<sup>86</sup> H.R. 2572, §9; Title II, §206.

<sup>87</sup> *Id.*

<sup>88</sup> 18 U.S.C. 3281, 3299.

<sup>89</sup> *Toussie v. United States*, 397 U.S. 112, 114-15 (1970)(“The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity”).

<sup>90</sup> 18 U.S.C. 3282(a)(“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed”).

<sup>91</sup> 18 U.S.C. 3301.

<sup>92</sup> S.Rept. 110-239, at 4, 5 (2007).

<sup>93</sup> H.R. 2572, §10 (proposed 18 U.S.C. 3302); Title II, §207 (proposed 18 U.S.C. 3302).

The proposal in each bill has certain drafting eccentricities. It would establish a six-year statute of limitations for a series of bribery offenses, but only one embezzlement offense (18 U.S.C. 666). It would apply to honest services mail and wire fraud, but not the proposed self-dealing mail and wire fraud. It would apply to the more narrow money laundering statute (18 U.S.C. 1952), but not the more general (18 U.S.C. 1956).

Finally, the bills would create a six-year statute of limitations for attempt to commit any of the listed crimes. Yet it is not a crime to attempt to commit some of them. It is a crime to attempt to violate the mail or wire fraud statutes, the Hobbs Act, or the Travel Act;<sup>94</sup> but it is not a separate crime to attempt to violate the bribery provisions of 18 U.S.C. 201 or 666 or the RICO provisions. Nevertheless, the proposal purports to set a six-year statute of limitations for crime and noncrime alike.

## Venue

### Place of Acts in Furtherance

The Constitution insists that federal crimes be tried in the states and districts in which they are committed.<sup>95</sup> Congress may provide by statute for the trial of any crime committed outside any state.<sup>96</sup> In the case of continuous crimes or crimes otherwise committed in more than one place, the Supreme Court in *Rodriguez-Moreno* held that the offense may be tried wherever a conduct element of the offense occurs.<sup>97</sup> Thus, conspiracy may be tried in any district in which an overt act in furtherance of the scheme is committed.<sup>98</sup> Congress has provided that as a general rule:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and ... may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves, *or in any district in which an act in furtherance of the offense is committed.*<sup>99</sup>

The bills would amend the venue statute to add language italicized above that would permit trial of an offense, involving use of the mail or interstate commerce or entry of individual or goods

<sup>94</sup> 18 U.S.C. 1349, 1951(a), 1952(a).

<sup>95</sup> U.S. Const. Art. III, §2, cl.3 (“The trial of all Crimes ... shall be held in the State where the said Crimes shall have been committed ...”); Amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ...”). For a general discussion see CRS Report RL33223, *Venue: A Legal Analysis of Where a Federal Crime May Be Tried*, by Charles Doyle.

<sup>96</sup> U.S. Const. Art. III, §2, cl.3

<sup>97</sup> *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999); see also, *United States v. Magassouba*, 619 F.3d 202, 206-207 (2d Cir. 2010); *United States v. Rodriguez*, 581 F.3d 775, 784 (8th Cir. 2009).

<sup>98</sup> *Whitfield v. United States*, 543 U.S. 209, 218 (2005); *United States v. Tzolov*, 642 F.3d 314, 319-20 (2d Cir. 2011); *United States v. Foy*, 641 F.3d 455, 466 (10th Cir. 2011).

<sup>99</sup> 18 U.S.C. 3237(a)(with language the House and Senate bills would add in italics).

into the United States, “in any district in which an act in furtherance of the offense is committed.”<sup>100</sup> The earlier committee report explained that

The [proposal] broadens the part of the general venue statute—18 U.S.C. §3237(a)—that governs venue in mail fraud cases, among other so-called ‘continuing’ offenses that may be carried out in more than one district. The bill would permit venue to lie in any district in which an act in furtherance of the offense is committed. It is designed to address situations where the bulk of the criminal conduct takes place in one district, but the required mailing to facilitate that scheme happens to occur in another. For example, if a fraud scheme is hatched and carried out by a public official from his Washington, D.C. office, but the mailing in furtherance of that scheme happens to be dropped in a mailbox near the public official’s home in Bethesda, Maryland, venue should be able to lie in the District of Columbia, because the principle acts in furtherance of the scheme took place in the District. Under current law, the case could only be brought in Maryland. The intent of this provision is to expand venue to include districts where any part of the offense occurred as well as the district where the actual mailing took place.<sup>101</sup>

Expanded venue options would apply not to just federal public corruption offenses but to any other federal offenses where federal jurisdiction is predicated on interstate commerce or use of the mail. The representative of the defense bar objected that the proposal would impose an unfair hardship upon the accused under some circumstances and might lead to forum shopping for that purpose.<sup>102</sup>

The Constitution, however, may limit the proposal’s scope to acts in furtherance that constitute conduct elements of the offense. In this context, a recent Second Circuit case may be instructive. In *Tzolov*, the court rejected the argument that venue was necessarily proper where the defendants committed an act in furtherance of the crime charged. In doing so, it distinguished an earlier case in which the act in furtherance case had been a conduct element of the offense:

Count Two charged Butler with securities fraud under 15 U.S.C. §§78j(b) and 78ff, which has its own specific venue provision: “Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred.” 15 U.S.C. §78aa. The government’s sole basis for venue in the Eastern District on this substantive count was that Butler and Tzolov traveled through JFK airport on their way to meet with the investors. According to the government, these flights are sufficient to establish venue because, under *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003), the flights were “an important part of furthering the [fraudulent] scheme.”

We disagree. We have little difficulty concluding that the government failed to offer competent proof that any “act or transaction *constituting* the [securities fraud] violation occurred” in the Eastern District. *See* 15 U.S.C. §78aa (emphasis added). Butler did not transmit any false or misleading information into or out of the Eastern District. All the fraudulent statements that were part of the government’s proof, whether made by Butler or Tzolov, were made in telephone calls or emails from Credit Suisse’s Madison Avenue offices located in the Southern District or in meetings with investors. None of this activity occurred in the Eastern District.

<sup>100</sup> H.R. 2572, §2; Title II, §202.

<sup>101</sup> S.Rept. 110-239, at 5 (2007).

<sup>102</sup> House hearing, O’Toole testimony (“The expansion of venue embodied by this section is the type of venue tampering that the U.S. Supreme Court has cautioned against. *United States v. Johnson*, 323 U.S. 273, 275-76 (1944) (‘[S]uch leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.’). If enacted, this section could invite abuse in the form of unfair forum-shopping for friendly locales in which to empanel a jury and far-flung locations to be used as leverage against defendants”).

Nor did Butler commit securities fraud by boarding a plane in the Eastern District. At most, catching flights from the Eastern District to meetings where Butler made fraudulent statements were preparatory acts. They were not acts “constituting” the violation. We have cautioned that venue is not proper in a district in which the only acts performed by the defendant were preparatory to the offense and not part of the offense. That is all we have here. In other words, going to Kennedy airport and boarding flights to meetings with investors were not a constitutive part of the substantive securities fraud offense with which Butler was charged....

The government’s reliance on *Svoboda* is misplaced. In *Svoboda*, we stated that “venue is proper in a district where (1) the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur in the district of venue or (2) it is foreseeable that such an act would occur in the district of venue [and it does].” 347 F.3d at 483. However, *Svoboda* does not control here. In *Svoboda* we were not faced with the question of whether preparatory acts alone could establish venue. Indeed, *Svoboda* did not involve preparatory acts at all. The act that established venue and that occurred “in furtherance” of the crime charged—the execution of a trade—constituted an essential element of the crime. See *id.* at 485.<sup>103</sup>

## Place of Obstructed Activities

The House and Senate bills contain other venue proposals, relating to perjury and the obstruction of justice, that would apply in federal public corruption cases and elsewhere.<sup>104</sup> The Supreme Court in *Rodriguez-Moreno* expressly declined to rule on whether venue may lie in the district impacted by the crime charged.<sup>105</sup> The witness tampering statute now has a subsection under which witness tampering and the obstruction of judicial proceedings may be prosecuted “in the district in which the official proceeding ... was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.”<sup>106</sup>

The bills would amend the subsection to permit similar treatment for the prosecution of obstructions in violation of 18 U.S.C. 1503 (obstruction of judicial proceedings), 1504 (writing to influence a federal juror), 1505 (obstructing Congressional or federal administrative proceedings), 1508 (eavesdropping on federal jury deliberations), 1509 (obstructing the execution of federal court orders), 1510 (obstructing federal criminal investigations).<sup>107</sup>

<sup>103</sup> *United States v. Tzolov*, 642 F.3d 314, 318-19 (2d Cir. 2011)(some internal quotation marks and citations omitted). See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 n.4 (1999)(distinguishing a conduct element from a circumstance element, i.e., conduct in furtherance (“By way of comparison, last Term in *United States v. Cabrales*, 524 U.S. 1 (1998), we considered whether venue for money laundering, in violation of 18 U.S.C. §§1956(a)(1)(B)(ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe ‘the anterior criminal conduct that yielded the funds allegedly laundered.’ *Cabrales*, 524 U.S. at 7. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred ‘after the fact of an offense begun and completed by others.’ *Ibid.* Here, by contrast, given the ‘during and in relation to’ language, the underlying crime of violence is a critical part of the §924(c)(1) offense”); *United States v. Strain*, 396 F.3d 689, 696-97 (5<sup>th</sup> Cir. 2005)(venue may not be predicated solely on acts of preparation to commit the offense charged).

<sup>104</sup> H.R. 2572, §15; S. 401, §15.

<sup>105</sup> *United States v. Rodriguez-Moreno*, 526 U.S. at 279 n.2 (1999).

<sup>106</sup> 18 U.S.C. 1512(i).

<sup>107</sup> H.R. 2572, §14(a); Title II, §210(a).

At the same time, they would create a new section that would afford prosecutors in federal perjury and subornation cases the same options:

A prosecution under section 1621(1)[perjury generally], 1622 [subornation of perjury](regard to subornation of perjury under 1621(1)), or 1623 [false declarations before the grand jury] of this title may be brought in the district in which the oath, declaration, certificate, verification, or statement under penalty of perjury is made or in which a proceeding takes place in connection with the oath, declaration, certificate, verification, or statement.<sup>108</sup>

The federal appellate cases announced after *Rodriguez-Moreno* suggest that the proposal's obstruction and perjury amendments may be limited to cases in which a conduct element occurs.<sup>109</sup>

## Wiretap Authority

Existing law authorizes federal courts to issue orders approving law enforcement installation and use of devices to intercept wire, oral, and electronic communications.<sup>110</sup> The orders are available upon a showing that interception is likely to result in evidence of one of a list specific predicate offenses.<sup>111</sup> Bribery of federal officials, mail fraud, and wire fraud are already predicate offenses.<sup>112</sup>

The bills would add offenses under Section 641 (theft of federal property), Section 666 (theft or bribery involving federal programs), and Section 1031 (major fraud against the United States).<sup>113</sup> The Justice Department has testified that “[p]rosecutors often have lamented their inability to use these tools in such cases.”<sup>114</sup>

## Judicial Disciplinary Investigations

Materials relating to a federal judicial council's investigation of a complaint filed against a federal judge are confidential.<sup>115</sup> The bills would allow the materials to be disclosed to federal or state grand juries and to federal, state, or local law enforcement officials.<sup>116</sup>

<sup>108</sup> H.R. 2572, §14(b)(proposed 18 U.S.C. 1624); Title II, §210(b)(proposed 18 U.S.C. 1624).

<sup>109</sup> *United States v. Bowers*, 224 F.3d 302, 308-11 (4<sup>th</sup> Cir. 2000)(noting that of the four elements of the harboring offense—a warrant had been issued for the fugitive's arrest, the defendant knew of the warrant, the defendant harbored the fugitive; and he did so in order to prevent the fugitive's arrest—only the act of harboring constitutes a conduct element. Thus, a defendant could not be tried in the district which issued the warrant, but in which defendant had committed no act of harboring); see also, *United States v. Strain*, 396 F.3d 689, 693-97 (5<sup>th</sup> Cir. 2005).

<sup>110</sup> 18 U.S.C. 2518. See CRS Report R41734, *Privacy: An Abridged Overview of the Electronic Communications Privacy Act*, by Charles Doyle.

<sup>111</sup> 18 U.S.C. 2516.

<sup>112</sup> 18 U.S.C. 2516(c)(“The Attorney General ... may authorize an application ... for ... an order ... approving the interception of wire or oral communications ... when such interception may provide ... evidence of ... (c) any offense which is punishable under the following sections of this title: ... section 201 ... section 1341... section 1343 ...”).

<sup>113</sup> H.R. 2572, §13; Title II, §209.

<sup>114</sup> House hearing, Brown testimony.

<sup>115</sup> 28 U.S.C. 360.

<sup>116</sup> H.R. 2572, §16; Title II, §212.



## Appeals

The United States Attorney must certify that any appeals by the government are not taken for purposes of delay and that in the case of an appeal relating to the exclusion of evidence must certify that the evidence is substantial proof of a material fact in the pending case.<sup>117</sup> The bills would permit certification as well by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General.<sup>118</sup> The proposal was not a feature of the bill reported out of the Senate Judiciary in the 110<sup>th</sup> Congress and no mention of it appears in the hearings held in this Congress. It appears to be the result of a situation that arose in *Weyhrauch*. In *Weyhrauch*, the government appealed the trial court's exclusion of evidence based on an interpretation of the honest services statute.<sup>119</sup> The Supreme Court ultimately granted certiorari<sup>120</sup> and thereafter returned the case to the Ninth Circuit for further consideration in light of *Skilling*.<sup>121</sup>

Prior to the case's arrival before the Supreme Court, however, the Ninth Circuit had ordered the government to show cause why its appeal should not be dismissed for failure to comply with the certification requirements of Section 3731.<sup>122</sup> The Executive Office for United States Attorneys had stated that the United States Attorney's Office for the District of Alaska was to recuse itself from participating in the *Weyhrauch* case.<sup>123</sup> Attorneys from the Justice Department's Public Integrity Section had prosecuted the case and the Chief of the Section had certified the appeal.<sup>124</sup>

The court found the certification insufficient, since the Chief had not been delegated authority to certify the appeal.<sup>125</sup> It later accepted the certification of the Attorney General, but suggested that alternative means of certification should be developed for instances when prosecutions were conducted by Justice Department attorneys other than those of a United States Attorney's office.<sup>126</sup>

## Where They Differ

H.R. 2572 and Title II are almost identical. There are a few differences, however. The penalty for bribery under 18 U.S.C. 201(b) is now imprisonment for not more than 15 years. The penalty for illegal gratuities under 18 U.S.C. 201(c) is now imprisonment for not more than two years. Title II would leave those penalties in place. H.R. 2572 would increase the maximum term of imprisonment for bribery under subsection 201(b) to 20 years and the maximum term for illegal gratuities under subsection 201(c) to five years.<sup>127</sup>

Status gifts now fall outside the illegal gratuities proscriptions of subsection 201(c). Moreover, existing law places no minimum on the value of the bribe or illegal gratuity condemned under subsections 201(b) or (c). Both bills would extend the illegal gratuities offense to include status

<sup>117</sup> 18 U.S.C. 3731.

<sup>118</sup> H.R. 2572, §18; Title II, §214.

<sup>119</sup> *United States v. Weyhrauch*, 548 F.3d 1237 (9<sup>th</sup> Cir. 2008).

<sup>120</sup> *Weyhrauch v. United States*, 129 S.Ct. 2863 (2009).

<sup>121</sup> *Weyhrauch v. United States*, 130 S.Ct. 2971 (2010).

<sup>122</sup> *United States v. Weyhrauch*, 544 F.3d 969, 970 (9<sup>th</sup> Cir. 2008).

<sup>123</sup> *United States v. Weyhrauch*, 548 F.3d at 1241.

<sup>124</sup> *Id.* at 1240-241.

<sup>125</sup> *United States v. Weyhrauch*, 544 F.3d at 972-75.

<sup>126</sup> *United States v. Weyhrauch*, 548 F.3d at 1241-242.

<sup>127</sup> H.R. 2572, §5(2), (3).

gifts, but both would limit the offense in status gift cases to gifts of \$1,000 or more.<sup>128</sup> H.R. 2572, unlike Title II, would also limit all other Section 201 bribery or illegal gratuities offenses to cases involving \$1,000 or more.<sup>129</sup>

Section 641 now prohibits the theft or embezzlement of federal property. H.R. 2572, unlike Title II, would expand the section to cover property of the District of Columbia.<sup>130</sup>

## What Has Changed

Sponsors have made a number of changes in the provisions of H.R. 2572 and Title II since they were first proposed. Examples include provisions for additional RICO predicates, the *Cleveland* fix, and penalty increases for certain public corruption offenses.

The federal Racketeer Influenced and Corrupt Organizations (RICO) provisions outlaw conducting the affairs of an enterprise whose activities affect interstate commerce through the patterned commission of various state and federal crimes (predicate offenses).<sup>131</sup> Violations are punishable by imprisonment for up to 20 years; may result in as well as the confiscation of related property; and may trigger the application of federal money laundering provisions.<sup>132</sup>

Both H.R. 2572, as introduced, and the predecessor to Title II, S. 401 as approved by the Senate Judiciary Committee, would have enlarged the RICO predicate offense list to include violations of 18 U.S.C. 641 (relating to the theft or embezzlement of federal property), 666 (relating to theft or bribery in connection with federally assisted programs), and 1031 (relating to major fraud against the United States).<sup>133</sup>

The mail and wire fraud statutes outlaw the use of mail or wire communications as part of a scheme to defraud another of money or property.<sup>134</sup> The Supreme Court in *Cleveland* held that the statutes do not reach fraudulent schemes to induce a state to issue licenses, since in the hands of the state unissued licenses do not constitute money or property.<sup>135</sup>

H.R. 2572 (as introduced) and S. 401 featured sections apparently designed to overcome the limitation identified in *Cleveland*.<sup>136</sup> Neither Title II nor H.R. 2572 has comparable sections.

<sup>128</sup> H.R. 2572, §§5(4), 7; Title II, §205(b)(1).

<sup>129</sup> H.R. 2572, §5(4); compare Title II, §205(b)(1).

<sup>130</sup> H.R. 2572, §6.

<sup>131</sup> 18 U.S.C. 1961-1964.

<sup>132</sup> 18 U.S.C. 1863, 1856(c)(7)(A).

<sup>133</sup> H.R. 2572 (as introduced) §13; S. 401, §10.

<sup>134</sup> 18 U.S.C. 1341, 1343.

<sup>135</sup> *Cleveland v. United States*, 531 U.S. 12, 20 (2000).

<sup>136</sup> H.R. 2572 (as introduced), §2 (captioned: “application of mail and wire fraud statutes to license and other intangible rights”); see also, S. 401, §3.

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